From the language of art 7(c) of the constitution of the FAM, it is quite clear that the prior consent of the council should be obtained before extending the jurisdiction.

In this case, when the order in issue was made on 16 August 1988, the order was valid only for the state of Johor.

The appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *Hassan Ibrahim & Co; Mohamad Ibrahim & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Eyan a/l Endin Pan

HIGH COURT (KANGAR) - CRIMINAL TRIAL NO 23 OF 1984
KC VOHRAH J
29 AUGUST 1989

Criminal Law - Dangerous drugs - Trafficking in - Whether contents in sack seized were 'raw opium' within the definition in the Dangerous Drugs Act 1952 - Possession by accused of sacks proved - Presumption of accused's knowledge of contents of sack raised - Whether presumption was rebutted by accused - Dangerous Drugs Act 1952, ss 2, 37(d), 39B(1)(a) & 39B(2)

The accused was charged on two counts of trafficking in dangerous drugs in 1984, to wit, 19.864kg of raw opium and 1,129g of morphine respectively and that the accused had thereby committed two offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), punishable under s 39B(2) of the Act. The case for the prosecution was that at the date and time and place specified in each of the two charges, the accused was seen walking ahead of another person along a bund between dry padi fields and was seen carrying a sack on his right shoulder. Upon the police coming out of their ambush position and identifying themselves, the accused dropped the sack and ran across the padi fields. The accused was subsequently caught and arrested and brought to the place where he had dropped the sack. The sack was found to contain 11 packages. One package was found to contain, upon analysis by a government chemist, 1,129g of morphine, and this formed the subject matter of the second charge. The other ten packages contained a black substance which was, on analysis by the same government chemist, found to be 19.864kg of 'raw opium' within its definition in s 2 of the Act, and this was the subject matter of the first charge. There was a dispute as to whether the contents of the sack were 'raw opium' within the meaning of its definition before its amendment in 1984. The government chemist concluded from his analysis data that the opium in the ten packages was raw opium as specified in s 2 before its amendment in 1984. The accused, in defence, denied the facts alleged by the prosecution on several aspects but did not dispute the prosecution's case that he was, together with another person, walking on a bund and that both were carrying sacks, one each, and that he dropped the sack and ran. The accused claimed that he did not, at any time, realize what the sack he was carrying contained.

Held, convicting the accused of both charges:

(1) Having gone through the government chemist's expert opinion and the article on a Japanese study 'Studies of Poppies and Opium' published in a United Nations Publication, *Bulletin of Narcotics*, April-June 1957 pp 20-33 that the chemist relied upon, the chemist's conclusion that the raw opium forming the subject matter of the first charge fell within its definition in s 2 of the Act prior to the 1984 amendment was to be accepted.

(2) At the close of the case of the prosecution, there were primary facts not inherently incredible which showed that the accused was in possession of a sack containing 11 packages. The presumption was, under s 37(d) of the Act, that since he was in possession of the sack containing the drugs, he knew the nature of the drugs in the sack, ie that he knew the raw opium in the sack was raw opium and that he knew that the morphine in the sack was morphine. And the raw opium and the morphine being in excess of the amounts presumptive of trafficking under sub-ss (da)(v) and (ii) of s 37 of the Act, the accused is presumed to have trafficked in raw opium and morphine respectively. Therefore, on a prima facie basis, the two charges were made out.

(3) There was no reasonable doubt created on the prosecution's case that the accused was seen together with another person carrying a sack each on the shoulder, and that both dropped the sacks and ran and the accused was arrested after a chase through some padi fields, and that the sack that he was carrying was the sack adduced in evidence before the court and that the sack contained raw opium and morphine. The accused was thus in possession of the sack and its contents.

(4) Considering the testimony of the accused in the totality of the evidence adduced, including the fact that the accused carried the sack in the dead of night and that he dropped the incriminating sack and ran when the police identified themselves, the presumption that he knew that the raw opium in the sack was raw opium and that he also knew that the morphine in the sacks was morphine had not been rebutted on the balance of probability.

(5) Further, the presumption that the accused was trafficking in the raw opium and the morphine as specified in the first and second charges respectively had not been rebutted on the balance of probability.

Legislation referred to
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), 39B(2)

Ahmad bin Maarof (Deputy Public Prosecutor) for the Public Prosecutor.
TS Marbeck for the accused.

Cur Adv Vult

KC Vohrah J: The accused faced two charges thus:

First Amended Charge

That you on 9 January 1984 at about 3am at Kampung Belukar Lengas, Chuping, in the district of Kangar in the State of Perlis, did traffic in dangerous drugs, to wit, 19.864kg of raw opium and that you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s 39B(2) of the same Act.

Second Amended Charge

That you on the 9 January 1984 at about 3am, at Kampung Belukar Lengas, Chuping, in the District of Kangar in the

State of Perlis, did traffic in dangerous drugs, to wit, 1,129g of morphine and that you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s 39B(2) of the same Act.

The case for the prosecution was that at the date and time and place as shown in both charges, a person (subsequently identified as the accused) was seen walking ahead of another person along a bund between dry padi fields; and the accused was seen carrying a sack on his right shoulder. DSP Ahmad bin Mohd Alim who led a police party there came out of his ambush position and identified himself as the police. He told the persons not to run but the accused dropped the sack and ran across the padi fields to his right. The other person also ran away. Both were chased. But the accused was caught and arrested and brought to the place where he had dropped the sack. This sack contained 11 packages. One package held a rectangular block of a whitish substance which, on analysis by a government chemist, was found to contain 1,129g of morphine, and this formed the subject matter of the second amended charge. The other ten packages, each wrapped in plastic, contained a black substance. The black substance in the ten packages was, on analysis by the same government chemist, found to be 19.864kg of 'raw opium' which the chemist said fell within its definition in s 2 of the Dangerous Drugs Act 1952 ('the Act') as the definition stood at the time the offences were committed. And this was the subject matter of the first amended charge.

I now come to the evidence. DSP Ahmad bin Mohd Alim (PW2), on the date and place as specified in the charges, laid an ambush with eight men in three groups near the junction of two bunds. These two bunds were raised above some dry padi fields in the area. The ambush point was some 50 yards in front of a house. PW2 and his group comprising Inspector Zainal Man and Constable Nazri hid behind some padi plants growing from the fields and behind some grass growing from the bund. The house was behind them. In front of them, at the end of the bund which stretched ahead of them, was a low hillock.

At about 3am, PW2 heard the sound of twigs being stepped on and he saw on the hillock, ahead of him, a figure. It was moving towards him 'slowly and stealthily'. He clearly saw the silhouette of a man's head with a bulge on the right shoulder, something above the shoulder but below the top of the head of this figure. Two or three seconds later, PW2 saw another figure directly behind the first figure about three yards away from the first figure, also moving in the same direction. PW2 fixed his sight on these figures. When the first figure was about two to three yards away form him, he shouted, 'Polis! Jangan lari.' And simultaneously he switched on the light of his torchlight and directed the light at the first figure. PW2 saw the features of this man. The man had both his hands held up in the region of the right shoulder as if holding something. And the load on his shoulder appeared whitish and fluorescent. This man, who was shirtless, let go the load and then ran towards the left of PW2, chased by Inspector Zainal Man and Constable Nazri. PW2 also saw, momentarily, the second figure run towards the hillock. PW2, however, continued to direct the light from his torch on the first figure and he saw Inspector Zainal Man and Constable Nazri chase the first man for about 20 yards, ending with his two men struggling with him and arresting him. PW2 then moved out from his ambush position along the bund to the spot where he had seen the first figure drop his load. He saw the load to be a sack made of plastic material (P5A) by the side of the bund. Shortly after that Inspector Zainal Man and Constable Nazri brought the person whom they had chased and arrested. This was the same person PW2 had seen as the first figure and whose features he had had a glimpse of earlier. He was the accused.

Inspector Zainal Man (PW4) substantially corroborated the evidence of PW2 with regard to the ambush that night. He stated that he only saw one figure moving towards the ambush position after PW2 had whispered, 'Orang! Orang.' He then heard PW2 shout, 'Polis! Jangan lari!' and he also saw PW2 direct the light of his torch on this figure. He saw a male, without a shirt, having something on his right shoulder. He saw this man let go the thing he was carrying and then run away. He said he and Constable Nazri then gave chase to the man and eventually Nazri caught hold of this man from behind whereupon Nazri and the man fell and there was a scuffle. He then went to assist Nazri and the man was eventually arrested. They then brought the man, the accused, to the spot where he had seen him drop his load and he said PW2 was already there. He saw a plastic sack by the side of the bund.

With regard to this plastic sack PW2 said, and this was corroborated by PW4, he inspected the sack and its contents at the spot where the sack was dropped. The sack (P5A) contained one block (P5B1) of what he suspected to be heroin and ten packages (P5B2 to P5B11) of what he suspected to be 'chandu'. PW2 then handed the sack and its contents to PW4 for safe custody. The contents of this sack form the subject matter of the two charges preferred against the accused. More dangerous drugs were discovered after the accused's arrest but the accused is not being charged in connection with them. These were those dropped by the other figure together with others discovered elsewhere. After PW2 had inspected the contents of the sack dropped by the accused, he moved further ahead along the bund and he saw another sack and a small yellow plastic bag. The sack contained three blocks of a substance which he believed to be morphine and nine packages of a substance which he believed to be 'chandu'. The yellow plastic bags had two plastic bags, one containing 55 bottles and the other, 30 bottles, each bottle containing what he

suspected to be heroin. Inspector Zainal Abidin (PW5) who had chased the other figure to no avail took charge of these exhibits after he had reported to PW2 that he had failed to catch the second figure.

PW2 then went to the house which was about 50 yards at the back of their ambush position and there he arrested one Aivean. In the vicinity of the house, PW2 found two sacks hidden amidst lallang. Each of the sacks contained ten packages of what PW2 suspected to be 'chandu'. After this PW2 brought the team and the accused and Aivean, together with all the exhibits which had been seized, to Kampong Guar Musang where two persons were arrested.

At the Kangar Anti-Narcotics office, PW2 went through all the exhibits and put identification marks on each and every item seized and he handed the exhibits so marked to ASP Yap (PW7) for safekeeping. ASP Yap (PW7) handed all the exhibits seized at the police operation including the sack (P5A) and the 11 packages therein to government chemist Chan Kee Bian (PW1), all properly marked and sealed. PW1 examined and analysed all the exhibits sent to him including the contents of the sack P5A which comprised one white rectangular block (P5B1) and ten packages (P5B2 to P5B11). He returned all the exhibits properly sealed to PW7 on 20 May 1984, but on 16 August 1985, he received back all the exhibits he had examined earlier with a request to do a profile test on the raw opium, to see if the raw opium came from the species Papaver Somniferum L. He found all the opium to be from the species and he repacked and resealed all the exhibits and on 22 January 1986 he handed them back to PW7. These same exhibits with the Jabatan Kimia seal no 5 on the repacked packages were identified by PW1 in court and the contents identified one by one by him in court. And I have no doubt that they were all seized at the police operation and that P5A containing P5B1 to P5B11 were dropped by the accused.

On analysis PW1 found the white rectangular block (P5B1) to contain 1,129g of morphine. This is the subject matter of the second amended charge. PW1 said that he analysed the contents of the other ten packages (P5B2 to P5B11) found in sack P5A and according to him, they contained 19.864kg of 'raw opium' in the following proportions: P5B2 - 1,990g; P5B3 - 1,962g; P5B4 - 2,001g; P5B5 - 2,012g; P5B6 - 1,972g; P5B7 - 1,977g; P5B8 - 2,010g; P5B9 - 1,997g; P5B10 - 1,990g; P5B11 - 1,953g.

There was dispute as to whether the contents of the sack were 'raw opium' within the meaning of its definition before its amendment in 1984. It reads:

> 'raw opium' means the spontaneously coagulated juice obtained from the plant Papaver Somniferum L, which has not undergone the process necessary to convert it to medicinal opium, whatever its contents of morphine.

The question is whether the coagulated juice was instead obtained from the species Papaver Septigerum DC. According to the chemist who has considerable experience in dangerous drugs analysis, the species Papaver Septigerum DC is a rare species in the sense that it is not cultivated. And he also said he had never seen its coagulated juice. He relied on a Japanese study 'Studies of Poppies and Opium' published in a United Nations Publication, *Bulletin of Narcotics*, April-June 1957 pp 20-33 which made a comparative study, basically of opium from Papaver Somniferum L and opium from Papaver Septigerum DC. The study made certain findings as regards five principal alkaloids, viz codeine, morphine, thebaine, papaverine and narcotine and their relative percentages in the raw opium in these two species. Using the reported ranges of their alkaloid profiles, and the rarity of the species Papaver Septigerum DC, he concluded from his analysis data that the opium in the ten packages was raw opium from the species Papaver Somniferum L as specified in s 2 before its amendment in 1984. I have gone through his expert opinion and also the article that he had relied on and I accept his conclusion that the raw opium, the subject matter of the first charge, was obtained from Papaver Somniferum L.

At the close of the case of the prosecution, there were primary facts not inherently incredible which showed that the accused was in possession of a sack containing 11 packages. The presumption is, under s 37(d) of the Act, that since he was in possession of the sack containing the drugs, he knew the nature of the drugs in the sack, ie that he knew the raw opium in the sack was raw opium and that the morphine in the sack was morphine. And the raw opium and the morphine being in excess of the amounts presumptive of trafficking under sub-ss (da)(v) and (ii) of s 37 of the Act, he is presumed to have trafficked in raw opium and morphine respectively. Thus, to my mind, on a prima facie basis, the two charges were made out. I called upon the accused to make his defence on both charges.

The accused elected to give evidence on oath. He called one witness, DW2, to testify on his behalf. He did not deny that he dropped the sack he had been carrying that night. But he said he did not know the nature of the contents of the bag. The accused said he had slept in the padi area (near the scene of arrest) because he had been requested by his employer, Tang a/l Endin Lee (DW2), who owned a plot of padi land there, to guard the harvested padi against theft and mice. He said he had been employed by Tang for three days to thresh the padi that had been harvested in Tang's land. On 8 January 1984, he slept in the padi land area under a shed made out of padi plants. He slept at 8pm. He woke up from his sleep on 9 January 1984 because he thought it was already dawn. And he then saw a person sitting on a bund. He said he walked towards this man and recognized him as Kloi who stayed in the same kampong as he. He saw two fertilizer plastic bags near

Kloi. Then Kloi told him that 'he was too tired and had no energy left' and requested him to carry one sack to the house of Aivean. The accused said Kloi and Aivean were related. He said that he then carried the bag, barebodied, with Kloi following, carrying the other bag, behind him. He next saw the light of a torchlight and some people. And he said that then Kloi ran away. He stated that he was frightened and he too ran away on the bund until he heard a gunshot and was told to stop. He stopped and a man told him he was a policeman and searched his person and recovered his identity card and his purse. He was then taken to Aivean's house and near the house two sacks were recovered. He was subsequently taken to Kampong Guar Musang where two other persons were arrested. The accused said he did not at any time realize what the sack he was carrying contained.

It can be seen that the accused is not disputing the prosecution's case that he, the accused, was together with another person walking on a bund, and that both were carrying sacks, one each; that he dropped the sack and ran. He said he ran because he saw the light of a torchlight and he also saw people there and he saw Kloi run away. At this stage, I wish to state that PW2 was recalled and cross-examined, inter alia, on a press statement made by the then Deputy Inspector Chief of Police on the operation conducted by PW2. Apparently the statement mentioned that the ambush took six hours and that two sacks were recovered 16km from where two persons were arrested. PW2 can hardly be responsible for the press statement which contains variations on details relating to the police operation. In any event it is not disputed that the accused was seen carrying the sack P5 which contained raw opium and morphine.

Coming back to the defence. The accused denied that he ran into the dry padi fields as alleged; he ran on the bund. And he said he heard a gunshot and he was told to stop and he stopped and then he was searched. It is clear, however, from the evidence of PW2 and PW4 and from photographs of the scene (P14A to G) that he ran into the padi fields. He was chased by PW4 and Constable Nazri as alleged by the prosecution. As for the shot being fired that night, PW2 was asked if shots were fired that night and he said he was positive no shots were fired that night and I have no reason to disbelieve him. To my mind, therefore, no reasonable doubt has been created on the prosecution's case that the accused was seen together with another person carrying a sack each on the shoulder and that both dropped the sacks and ran and that the accused was arrested after a chase through some padi fields, and that the sack that he was carrying was P5A and that the sack contained raw opium and morphine (P5B1-P5B11). He was thus in possession of the sack and its contents.

I now come to the matter of the presumptions that the accused knew the drugs in the sack P5 were raw opium and morphine and that he was trafficking in the raw opium and the morphine. His story that he worked in the area for DW2 was apparently supported by DW2. They both said his duty was to thresh padi during the day and additionally to guard the padi against theft during the night. But there were material discrepancies. The accused said he last met DW2 two days before 8 January 1989 (he was arrested at 3am on 9 January 1984) at the house of DW2 when he went home for lunch. DW2, on the other hand, said he met him the night of the arrest itself, at 10pm, ie 10pm on 8 January 1984 and he was adamant about it; he had his watch, he brought food and drinks for the accused and he had done it for three successive nights and the accused was still working, still threshing the padi. But the point is that at 10pm on 8 January 1984, if the accused is to be believed, he (the accused) was sleeping; the accused said that he went to sleep that night at about 8pm. He said he was tired and slept at 8pm.

Considering these material discrepancies and other matters which I will shortly consider, my view is that while the accused may have been employed by DW2, the accused was certainly not additionally employed to sleep the night in the fields and certainly not on 8 January 1984 to guard DW2's padi against theft and mice. The story of the accused that he slept the night there and waking up thinking it was dawn is hardly credible. He was seen carrying the sack at 3am and it certainly was not dawn then. He said by 'dawn' he meant it was going to be day. And he insisted that when he carried the bag it was already daylight! But he forgot this aspect of his evidence when the latter stated that he ran because he saw the light of a torchlight and became frightened. When confronted with this earlier statement of his that when he carried the bag it was already daylight, he said it was not daylight; it was bright. Then again his story of his encounter with Kloi contains a number of strange aspects of behaviour. He said he woke up as he thought it was dawn and then he saw a figure 40 yards away sitting on a bund. But it is strange that he did not pause to survey who the figure was; he should have been on guard for, after all, he was there, as he alleged, to guard against the theft of the padi and this was an open field. He awoke, saw the figure, and he straightaway walked towards the person as he wanted 'to make sure who the person was'! He did not know who the person was, yet he bravely walked towards him!

This is not the only strange aspect of his behaviour that night. He said he saw it was Kloi, his friend. Yet he did not ask him why he (Kloi) was there and he did not even greet him that night; in fact, he agreed that he did not say anything to Kloi. When his story appeared ridiculous on his being examined further by the DPP, he shifted ground and conceded he asked Kloi, 'Why?' when Kloi called him. And, he said, Kloi then told him he was too tired and requested him for help to carry a sack to Aivean's home. The accused said that after that he did not utter a

word and that he carried the bag. His reason for his taciturnity that night was that he was not talkative. And DW2 who gave his evidence after the accused also said the accused was not talkative. My view, however, is that there was no conversation at all between the accused and Kloi as there was no such meeting between them; the coincidental meeting of the accused with this Kloi at 3am in the morning when he woke up thinking it was dawn, and his becoming a good Samaritan carrying a bag for Kloi without question, is nothing more than a fanciful invention to extricate himself from the charges.

His fanciful story did not end there. He stated that he did not untie the sack which Kloi requested him to carry, that he did not ask Kloi what it was, and that was because he and Kloi were fellow Siamese and Kloi had asked for a favour. Thus he did not know what the sack carried. But as it turned out he did think it was something familiar. He admitted later that he thought the sack contained fertilizer as the sack was a fertilizer sack and he thought the contents were fertilizer in powder form. The court told him to feel the said sack (P5A) with the 11 packages of drugs (which were found in it) inside the sack and asked him if the contents felt like powder. His answer was, 'not like powder'. When he was asked to explain how he could say that on that day it was fertilizer in powder form, he lamely said, 'The one I carried was in powder form - I cannot explain.'

Considering all the foregoing in the totality of the evidence adduced including the fact that the accused carried the sack in the dead of night, that he dropped the incriminating sack and ran when the police identified themselves, the presumption that he knew that the raw opium in the sack was raw opium and that he also knew that the morphine in the sacks was morphine has not been rebutted on the balance of probability. I also find that the presumptions that he was trafficking in the raw opium and in the morphine as are specified in the first and second charges respectively have not been rebutted on the balance of probability. I therefore find him guilty and convict him of both the charges.

Order accordingly.

Solicitors: *Yusuf, Lee, Pathma & Marbeck.*

Reported by *Yap Shao Sin*

YK Fung Securities Sdn Bhd v Ronald Yeoh Kheng Hian

HIGH COURT (IPOH) - CIVIL SUIT NO 23-550-86
ABDUL MALEK J
26 AUGUST 1989

Civil Procedure - Stay of execution - Matter of discretion - Special circumstances of the case - Writ of seizure and sale - Disclosure of full assets and liabilities - Rules of the High Court 1980, O 47 r 1(3)

Civil Procedure - Summary judgment - Appeal against - Whether triable issues raised - Whether contract had been made between parties - Alleged contract made on behalf of third party - Admissibility of oral evidence

Contract - Debit note unsigned - Whether contract made between parties - Alleged contract made on behalf of third party - Oral evidence brought to contradict terms of contract - Whether admissible - Evidence Act 1950, s 92

The plaintiff obtained summary judgment for $607,347.76 together with interest and costs arising from a claim in respect of the defendant's purchase of 500,000 shares ('the shares') in Everpeace Corporation. The defendant executed a margin agreement with the plaintiff which allowed him to buy and sell at the exchange. By the terms of the margin agreement, the defendant was to pay the plaintiff a margin deposit equivalent to 30% of the market value of the shares bought. The cost of the shares at the time of purchase was $758,250. The defendant paid $227,475 and a further $1,562.20 being interest for October 1985. Statements of accounts were sent to the defendant from May 1986 to April 1987. The defendant appealed against the summary judgment and applied for a stay of execution pending appeal to the Supreme Court.

The plaintiff had argued that oral evidence was not admissible in view of s 92 of the Evidence Act 1950. It was submitted that this did not apply where the documents do not constitute a contract as the debit note for the purchase of the shares was not signed by the defendant although his name was typed in; and it stated that the shares were bought on the defendant's order. Further, the defendant alleged that the contract was not between him and the plaintiff.

Held, dismissing the defendant's appeal and application for stay of execution:

(1) The relevant debit note stated the name of the defendant in his personal capacity and the defendant had signed the margin agreement with the plaintiff. He even paid the 30% deposit required and paid interest. He was subsequently furnished with the relevant monthly statements of accounts to which he had no objections, protests or queries. Further, the reference to another proceeding between the plaintiff and the third party is founded on a different transaction. The allegation that this contract was between the third party and the plaintiff therefore failed.

(2) Where documents clearly state that goods were ordered by one party, they should not be allowed to bring oral evidence to contradict the terms of the contract and to show that the goods were ordered for another. As such, no triable issue has been raised by the defendant.

(3) Apart from the averments of the defendant, it cannot be said that the plaintiff was in a state of poverty even if it used the judgment sum to pay off its other liabilities. Further, the defen-